First District, State of Illinois, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case at bar, and that the judgments and orders of said Appellate Court of Illinois for the First District may be reversed by this Honorable Court and that your petitioner may have such other and further and different relief in the premises as to this Court may seem meet and just.

And your petitioner will ever pray.

DAISY C. TEGTMEYER,
Petitioner.

BRIEF IN SUPPORT OF PETITION.

The Appellate Court of Illinois filed an opinion affirming the order awarding the writ of *ne exeat* and the order holding petitioner to be in contempt of Court. (306 Ill. Appellate Court of Illinois 169.) The opinion is set forth in the appendix. A decree directing petitioner to account was affirmed in *Tegtmeyer* v. *Tegtmeyer,* 259 Ill. App. 661 Abst). That decree was affirmed by the Supreme Court of Illinois, 348 Ill. 434. After the affirmance by the Supreme Court of Illinois the cause was referred to a master in chancery to take the account. Thereafter, petitioner was committed on *ne exeat* and contempt orders. Her petition to be released from custody was denied and her appeal was denied, *Tegtmeyer* v. *Tegtmeyer,* 292 Ill. App. 434.

Jurisdiction.

The judgment of the Appellate Court of Illinois was entered on July 8, 1940. Petition for leave to appeal from

the aforesaid judgment was duly filed for the October Term 1940, in the Supreme Court of Illinois and was denied on October 17, 1940. Extension of the time within which to file petition for certiorari in this Court was extended to and including March 15, 1941, by Mr. Justice Frank Murphy on January 7, 1941 (Record p. .....; Appendix p. 44).

The jurisdiction of this Court is invoked under Section 344, 28 U. S. C. A. and Section 237 (b) of the Judicial Code, 28 U. S. C. A. (342b).

Questions Presented, Statement, etc.

The questions presented, statement of the case and the specifications of error relied upon are set out in the petition. A summary of the facts will be given in the argument for the petition for certiorari.

ARGUMENT.

The Illinois Courts had no jurisdiction over the subject matter of the proceeding; if it had jurisdiction it could not enforce its decree by imprisonment for life in a common jail for failure to pay a debt.

Before presenting our argument petitioner submits (1) "That a judgment of the Appellate Court of Illinois which the Supreme Court of the State may review by certiorari becomes final when the latter Court denies the writ, and if it involves a federal question, is thereupon reviewable here." *Minneapolis R. R. Co.* v. *Rock,* 279 U. S. 410. In the instant case the Supreme Court of Illinois denied peti-

tioner the right to appeal from the Appellate Court of Illinois and the writ for certiorari if granted, should issue to the Appellate Court of Illinois.

2. That jurisdiction of this Court, of an appeal from the final judgment of a State Supreme Court, sufficiently appears where the opinion of that Court on a first appeal of the case, from an interlocutory judgment shows that the requisite federal question was raised by and decided against appellant. *Gant* v. *Oklahoma City*, 298 U. S. 98.

Petitioner proposes to bring up for review the entire record including all previous proceedings leading up to the making of the present decree from which an appeal is sought. The first proceeding was a bill to compel the alleged trustee to account for trust funds. A decree was entered restraining the alleged trustee (petitioner) from disposing of any of her property by the Circuit Court of Cook County of Illinois. The Appellate Court of Illinois affirmed that decree (259 App. Ct. Ill. 661). That decree was then affirmed by the Supreme Court of Illinois, 348 Ill. 434. This decree was not final as it required petitioner to account before a Master. During such hearings the orders from which appeal is sought to be made here were entered.

A petition for certiorari could not have issued to the Supreme Court of Illinois to review (348 Ill. 434) for that decree was interlocutory in nature. Such a writ would have been dismissed for want of jurisdiction. *Gant* v. *Oklahoma*, 284 U. S. 594.

Petitioner is the widow of one Edward Tegtmeyer. Edward was the administrator of his father's and mother's estate in the State of Iowa. The other children entitled to share in both estates were five in number. One son named Frank had disappeared. In administering the father's and mother's estate in the Probate Court in Iowa, no mention

was made of Frank. The estates were administered by consent of the other five children on the theory that there was no child by that name in existence.

The five children decided to distribute the estate of their father and entered into a written agreement. It is set forth in full in the statement of facts.

In brief it recites the fact that petitioner's husband, Edward, was the administrator of the father's and mother's estates that Frank had disappeared and that a distribution of the father's estate be made. It was further provided that Edward, the administrator (husband of petitioner) retain $5,000 as a trust fund for a period of ten years. At the termination of ten years or sooner, if it can be proven that Frank is deceased and left no heirs then the trust funds with its accumulations be distributed in equal parts to the parties to the agreement unless Frank should appear and claim his share.

The petitioner is brought into the picture by virtue of the following provisions in the contract 'it is further agreed that Daisy Tegtmeyer (petitioner herein), the wife of Edward Tegtmeyer, is to sign this contract with her husband *as a guarantee* that the said trust fund of $5,000 with the interest accumulations will be kept and distributed as herein provided':

It seems clear from the terms of the agreement that petitioner's obligation, if any, was to guarantee the distribution of the fund entrusted to her husband.

Petitioner's husband having died, the parties and their heirs to the aforesaid agreement brought an action in equity in the Illinois Courts to impress a trust on petitioner's property on the theory that she became the trustee of the funds entrusted to her husband. She was directed by the Illinois Courts to pay over upwards of $30,000 and for her failure to do so, she has been imprisoned since 1933.

Contentions were made in the Illinois Courts that it did not have jurisdiction of the subject matter. (See opinion Appendix.) Contentions were made that the orders were made in violation of the 8th and 14th amendments of the United States Constitution and to the Bill of Rights contained in the Illinois State Constitution. (See opinion 292 Ill. App. 434.)

It is self-evident that the estates of the parents of the children was not fully and completely administered in the State of Iowa due to the fraudulent acts of the heirs themselves (exclusive of Frank). The $5,000 which was by private agreement set aside for Frank, the missing son, was a fund which should have been administered by the Iowa Courts. The entire proceeding in the Probate Courts in Iowa were irregular and tainted with fraud and deceit in that Frank was not listed as an heir and the proceedings never terminated there as they were opened for the purpose of administering his interest. The estates of the parents were Iowa estates and jurisdiction over Frank could have been had by publication of a citation directed to him in accordance with Iowa Probate practice.

This contention was overruled by the Appellate Court of Illinois on the theory that such a contention was previously overruled, and on the further ground that the *situs* of the trust of this part of Frank's share was in Illinois.

The learned Appellate Court was in error when it states that the question of jurisdiction may not be attacked collaterally or in different proceedings.

In *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165 at page 173 this Court stated:

> "It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings and without which the

act of the Court is a mere nullity; such for example, as the service of process within the State upon the defendant in a common law action, *D'Arcy* v. *Ketchum*, 11 How. 165, the seizure and possession of the *res* within the bailiwick in a proceeding in *rem*, *Thompson* v. *Whitman*, 18 Wall 457; where the property of an absent defendant is sought to be charged, *Gaysin* v. *Page*, 18 Wall 350; *Guaranty Trust Co.* v. *Green Cave Railroad*, 139 U. S. 137. So if the Court appoint an administrator of the estate of a living person, or, in a case where there is an executor capable of acting, *Griffith* v. *Frazier*, 8 Cranch 9 ..... In these and similar cases the action of the Court or officer fails for want of jurisdiction over the person or subject matter. The proceeding is a nullity and its invalidity may be shown in a collateral proceeding."

Since it was shown that the estates in Iowa were reopened and a person was capable of acting there to administer the unadministered estate to which Frank was entitled to, the Illinois Courts did not have jurisdiction of the person of petitioner or the subject matter.

Further, by the laws of Illinois, Section 138 Subd. 14 of the Civil Practice Act, it is provided that jurisdiction of a person unknown, may be had by publication. In the proceedings against the petitioner in the Illinois Courts, Frank Tegtmeyer, the missing heir, is not made a party to the proceedings, he is neither plaintiff or defendant nor was jurisdiction obtained of Frank as outlined by the Illinois Civil Practice Act. The decree certainly is not binding on him or his heirs for want of service of process. Clearly, if the proceeding is one to enforce a trust, which is claimed to be transitory, the *cestui que* trust must in some way be a party to the proceeding.

It would appear from the record that the Illinois Courts in order to obtain jurisdiction of petitioner have changed her status from one of a guarantor to one of a trustee.

The agreement specifically states that petitioner, "the wife of Edward the Administrator is to sign the agreement with her husband as a guarantee that the $5,000 will be kept and distributed as provided in the agreement. Her obligation is one of indemnity for the default of her husband. She was neither heir, distributee or beneficiary of her husband's parents' estate.

For failure then to guarantee the acts of her husband which is nothing more than a failure to pay a debt of her husband, she is imprisoned until such time as she makes payment of $30,000. This on the theory that in failing to pay as directed by the Court she was guilty of contempt of Court, and imprisoned in the common jail of Cook County and has been held there for over six years and a mandate has been issued from the Appellate Court of Cook County pending this action to return Mrs. Tegtmeyer to the jail irrespective of her serious condition of health as shown by affidavit of William H. Kenner, M.D., which also states that further confinement in the jail or similar institution would result in the very early death of Mrs. Tegtmeyer.

As illustrative of the wide range of situations in which enforcement of judgments of the Supreme Court by contempt has been denied, and the successful party remitted to remedy by execution, the following may be noted; restitution of moneys paid on a judgment, subsequently reversed (*Marles, Inc.* v. *Ritter,* 257 N. Y. 240, 243, 177 N. E. 434; *O'Gara* v. *Kearney,* 77 N. Y. 423, 425, 426; *LeGros* v. *Chain Shirt Shops, Inc,.* 187 App. Div. 368, 370, 176 N. Y. S. 621), moneys found due on a partnership accounting (*People, ex rel. Bellovin* v. *Sheriff of Kings County,* 246 App. Div. 623,

282 N. Y. S. 966, affirmed 270 N. Y. 631, 1 N. E. 2d 364) even though payment had been directed to a receiver (*Walford* v. *Harris*, 78 Hun. 346, 347, 29 N. Y. S. 126) moneys due an attorney (*Kane* v. *Ross*, 87 App. Div. 101, 103, 84 N. Y. S. 111, affirmed 177 N. Y. 557, 69 N. E. 1125), paid on a fraudulent mortgage (*Hennig* v. *Abrahams*, 246 App. Div. 621, 622, 282 N. Y. S. 970, affirmed 270 N. Y. 626, 1 N. E. 2d 362), received under a void assignment for the benefit of creditors (*Myers* v. *Becker*, 95 N. Y. 486, 492, 493) recovered by reason of a misappropriation of corporate funds (*Nelson* v. *Hirsch*, 264 N. Y. 316, 318, 190 N. E. 653) or pursuant to a judgment creditor's action (*Siegel* v. *Seidenberg, Keroes & Dratfield, Inc.*, 237 App. Div. 129, 261 N. Y. S. 350) *or payable to a receiver in sequestration proceedings. General Electric Co.* v. *Sire*, 88 App. Div. 498, 501, 85 N. Y. S. 14). Many additional determinations have reiterated the same principles. See, *e. g.*, *Cohen* v. *Cohen*, 252 App. Div. 885, 886, 300 N. Y. S. 202; *S. & N. Trading Corp.* v. *Amazon Building Corp.*, 236 App. Div. 739, 257 N. Y. S. 1076; *Wagenheim* v. *Ocean Parkway Properties, Inc.*, 235 App. Div. 642, 255 N. Y. S. 184; *Wasserman* v. *Lupis*, 223 App. Div. 773, 227 N. Y. S. 467.

The decisions of the Illinois Courts in brushing aside petitioner's contentions that the order imprisoning her for life in a County Jail were vicious and void and in violation of the 8th and 14th amendments to the United States Constitution and to the Bill of Rights contained in the Illinois State Constitution in that it contains no definite term for the detention and imprisonment of defendant; on the further ground that the contempt order was entered at the request of plaintiffs in an attempt to enforce the terms of the decree for their own exclusive gain and benefit, took the position that her failure to pay over money to a receiver appointed by the Court, was a contempt of Court. Any imprisonment that fol-

lowed was not because she failed to pay the money, but because of her disobedience of the Court mandate in failing to pay.

If there be logic in this reasoning then a person's liberty depends on the disposition of each particular Judge who may or may not punish a person for contempt of Court and thus indirectly imprison such person for his failure to pay a debt.

This amounts to no less than cruel and unusual punishment and a deprivation of a person's life, liberty and property without due process of law in violation of the 8th and 14th amendment of the U. S. Constitution and to the Bill of Rights contained in the Illinois State Constitution which expressly provides that a person may not be imprisoned for a debt.

The personal property of the Estate of Henry Tegtmeyer passed to the Administrator upon his appointment and giving bond. The legal title to this property was in him and the fact that he moved out of the state and took a portion of the property out of the state, did not deprive him of his title to said property. This is the law in Iowa and Illinois and is well settled in the case of *Griffith* v. *Frazier* decided by the Supreme Court of the United States in the 8th Cranch Page 11 and 3rd. Ly. Co-op Ed. Page 471.

Mr. Chief Justice Marshall said:

> "That the appointment of an executor, and his acceptance of the office constitute a complete legal owner of the personal estate of the deceased is admitted. So long as the executor is capable of exercising the authority with which he has been invested by the testator, it can be conferred on no other person. Here the executor, who after taking out letters testamentary,

absents himself from the state. He is still capable of performing and he is still bound to perform, all the duties of an executor. There exists no legal disability in the executor, and, consequently there is no necessity for transferring to another those powers which the testator has conferred on a person selected by himself."

To determine who is entitled to succeed to such property as heirs of the owner, resort is had to the laws of the State to which the owner had his domicile at the time of his death, rather than to the laws of locality in which such personalty happened to be located. *Caruth* v. *Caruth,* 128 Iowa 121. *In re Estate of Titterington,* 130 Iowa 356. See also *in re Estate Colburn,* 186 Iowa 593 and many other cases to like effect.

There is some suggestion that when the Administrator Edward Tegtmeyer removed a portion of the funds to Chicago, that by that act he became an Administrator *de son tort.* This is not the law in Iowa.

This section defines an Administrator *de son tort,* and makes him accountable only to the legally appointed Executor or Administrator.

Edward Tegtmeyer was legally appointed, duly qualified and acting, had given bond for the faithful performance of his duty on which he and the bondsman were liable for any wrongful act.

The complainants in this action claim that Edward Tegtmeyer held the money which was left in his possession only, under the written agreement which they executed, Exhibit 7, and their right of recovery must be against him on this written contract.

The fact that $8,000.00 of the funds of the Estate of Henry Tegtmeyer were drawn from the Bank at Burling-

ton, Iowa in August 1913, the greater part of which was returned before the distribution made on the 18th day of October 1913, in no wise changed the character of the fund. When he made his final report to the Court in October 1913, accounting was made of all of the funds which came into his hands, no concealment was made of any portion of the fund and the heirs receipted in full for their respective shares and later on October 20th executed the contract upon which this action is based, complainants Exhibit #7.

In August 1913 Edward Tegtmeyer invested large sums of his money in a piece of Chicago real estate, the defendant, Daisy Tegtmeyer put in a large sum of her money in the same property. The title was taken in their names as joint tenants with right of survivorship and not as tenants in common. It is shown by the records that Edward Tegtmeyer and Daisy Tegtmeyer transacted their own banking business, kept their accounts in different banks and managed their own affairs. There is no showing whatever, that Daisy Tegtmeyer knew at the time of the purchase of this property or at any time prior to the commencement of this action, subsequent to the death of Edward Tegtmeyer, that any money of the purchase price of the property so purchased, belonged to any other person, than her husband and herself. The title was taken in joint tenancy with full knowledge that upon the death of either, the survivor became invested with the title of the whole of said real estate. If Daisy Tegtmeyer had died first, the entire property would have passed to her husband. This property, so far as the defendant, Daisy Tegtmeyer is concerned was, prior to the commencement of this suit, her sole and individual property, she was in possession as an innocent purchaser for value. It had been sold by her to other parties for valuable consider-

ation prior to the commencement of this action and the impounding of the money she was to receive as the purchase price of this property, or any portion thereof, was in the judgment of the defendants unwarranted and illegal.

The money retained by Edward Tegtmeyer, if any, in the settlement of his father's estate, never passed into the hands of any of the heirs, the agreement so recites, that it be retained by him out of the funds of the Estate of Henry Tegtmeyer and the reason for retaining it was, that there was an absent brother, Frank Tegtmeyer, who had not been heard of for many years, it is so named in the contract, and the money was to be held by Edward Tegtmeyer, deposited in some bank or Trust Company, for a period of ten years or a shorter period, if Frank Tegtmeyer were proven dead.

The existence of the *presumption* that Frank Tegtmeyer was dead was just as valid and forcible at the time said contract was entered into as it is at this time. It was the interest of the deceased brother Frank that was being held and was being held to protect the Administrator in the event that Frank Tegtmeyer should return. No distribution of this fund or any portion of the Estate of Frank Tegtmeyer would have been of any validity whatever as against him, if he should have returned at any time or should he at any time return and claim the same. This matter is well settled by the courts of every jurisdiction. It is sufficient to refer to the opinion of the Supreme Court of the United States, *Scott* v. *MacNeal*, 154 U. S. page 56 L. Co-op Book 38, 896. The case is elaborately briefed and discussed on page 46 of the Opinion, 154 U. S. at 901, 38 L. Co-op the court says:

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

The words 'due process' of law,'' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.' *Pennoyer* v. *Neff,* 95 U. S. 714, 733 (24; 565, 572). Even a judgment in proceedings strictly in *rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually, or by the thing condemned being first seized into the custody of the court. *The Mary,* 13 U. S. 9 Cranch, 126 144 (3:678, 684); *Hollingsworth* v. *Barbour,* 29 (U. S. 4 Pet. 466, 475 (7:922, 926); *Pennoyer* v. *Neff,* 95 U. S. 714, 727 (24; 565, 570). And such a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist.

The Estate of a person supposed to be dead is not seized or taken into the custody of the court of probate upon the filing of a petition for administration, but only after and under the order granting that petition; and the adjudication of that court is not only upon the question whether he is living or dead, but also upon the question whether and to whom letters of administration shall issue. *Mutual Ben. L. Ins. Co.* v. *Tisdale,* 91 U. S. 238, 243 (23;314,317).

A court of probate must, indeed, inquire into and be satisfied of the fact of the death of the person whose

will is sought to be proved, or whose estate is sought to be administered, because, without that fact, the court has no jurisdiction over his estate; and not because its decisions upon the question whether he is living or dead can in anywise bind or estop him, or deprive him, while alive, of the title or control of his property.

In *Cunnius* v. *Reading School District,* U. S. Sup. Court Rep. in 49 Ly. Ed. on page 1125. In 198 U. S. page 458:

> "The probate court has no power to administer the property of a person who is alive, under its general authority to provide for a settlement of estates of deceased persons, for to do so would violate the 14th Amendment, but the state has power, by legislation, to provide for the administration of the estates of persons who are absent for an unreasonable time, and to enact reasonable regulations on that subject without violating the 14th Amendment. Such legislation must provide for preservation of the estate for a reasonable time, awaiting the possible return of the supposed decedent, and designate such period as one of limitation of time within which to appear, and permit no distribution to heirs until the expiration of the period so fixed."

The presumption of death by reason of absence of a person for more than seven years, is simply one way of proving that the party whose estate is to be administered is dead. The absence itself for any period is not sufficient even to evoke the presumption, unless it was shown that diligent search or an attempt made to locate the absentee, the mere absence of a person for seven years or for any other period, does not entitle any person or persons to take his property and distribute it among themselves. The only way in which it can be done is by notice to the per-

son so absent and to all other persons interested. No legal presumption arising that a man who left his home in apparent good health at early manhood, single, remained single, or that he died, if he is dead, died without heirs or without creditors. His estate, during his absence, must be held to await his return, unless the necessary legal steps are taken to have him adjudged dead and his property distributed according to the law of his domicile.

Frank Tegtmeyer, owed his brothers and sisters nothing. They are not seeking to attach his property and subject it to their own use by reason of any debt or claim that they might have against him in this respect. Attorneys for complainants seem to have been confused. A Trust agreement between his brothers and sisters to take and divide his property among themselves was of no effect or validity. His estate could only be administered in the State of his domicile, after due notice, as required by statute. The contract of October 20, 1913 in no manner bound the Estate of Frank Tegtmeyer, if he were dead, or his interest in the Estate of Henry Tegtmeyer, if he were dead or alive. His estate could only be distributed, after due notice and an opportunity given for the absentee, his widow, heirs, legatees or creditors to appear and show who his legal heirs were and their respective rights in the Estate.

The Estate of an absentee does not pass to his heirs by reason of his absence. His absence can only be used under the statute for the purpose of enabling the parties interested to administer the Estate unless the parties are attempting to enforce a contract or claim against the absentee. It is the absentee's property that is being seized and distributed or unlawfully taken.

In the case of *Nina Wright Beckwith* v. *Daniel W. Bates,* decided by the Supreme Court of Michigan, reported in

200 N. W. Reporter on Page 151. Also A.L.R. Ann. Vol. 37, page 819.

This case collects all of the authorities upon the right to distribute the Estate of an absentee from Paragraph Three of the syllabus:

> Seven years absence of a person without knowledge by his relatives of whether he is living or dead does not vest the right to his property in presumptive heirs or admit of its apportionment among them by way of distribution in ordinary administration as of an estate of a deceased person.

The court also held: "That it is not competent for a state, by a law declaring a judicial determination that a man is dead, made in his absence, and without any notice to or process issued against him, conclusive for the purpose of devesting him of his property and vesting it in an administrator, for the benefit of his creditors and next of kin, either absolutely or in favor of those only who innocently deal with such administrator. The immediate and necessary effect of such a law is to deprive him of his property without any process of law whatever, as against him although it is done by process of law against other people, his next of kin, to whom notice is given."

And such a law violates the 14th Amendment of the Constitution of the United States.

As pointed out in *Cunnius* v. *Reading School Dist.*, 198 U. S. 458, 475, 49 L. ed. 1135, 1132, 25 Sup. Ct. Rep. 721, 3 Ann. Cas. 1121, the probate court has no power to administer the property of a person who is alive, under its general authority to provide for a settlement of estates of deceased persons, for to do so would violate the 14th Amendment; but the state has power by legislation, to provide for the adminis-

> tration of the estates of persons who are absent for an unreasonable time, and to enact reasonable regulations on that subject without violating the 14th Amendment. Such legislation must provide for preservation of the estate for a reasonable period, awaiting the possible return of the presumed decedent, and designate such period as one of limitation of time within which to appear, and permit no distribution to heirs until the expiration of the period so fixed. See also *Blinn* v. *Nelson*, 222 U. S. I. 56 L. ed. 65, 32 Sup. Ct. Rep. 1 Ann. Cas. 1913 B, 555.

The written agreement of October 20, 1913 was an attempt by certain persons, who claimed to be the heirs of Frank Tegtmeyer, to divide his property without notice of any kind, and to distribute a fund in the hands of the District Court of Des Moines County, Iowa, arising from the estate of Henry Tegtmeyer in an unlawful and surreptitious manner concealing their action from the court and was joined in by all of the complainants or their ancestors, who claim an interest in the unlawful fund they sought to be distributed.

The Iowa Statute for the distribution of the Estate of Absentee was drawn with due care to comply with the decisions of the Supreme Court of the United States.

The Agreement made October 20, 1913, Plaintiff's Exhibit No. 7, provides:

> Therefore it is agreed as follows:—The said Edward Tegtmeyer, administrator of the estate of Henry Tegtmeyer is to proceed to make a final settlement of said estate and distribute the net assets thereof amongst the heirs on the *assumption*, that the said Frank Tegtmeyer is dead and left no heirs but the said Administrator is to retain $5000.00 out of the assets of said estate as a trust fund to be kept on

deposit in the name of Edward Tegtmeyer Trustee for a period of ten years in a reliable bank or Trust Company and the interest to be added to and to become part of said trust fund;

At the termination of the period of ten years from this date or sooner, if it can be proven, that the said Frank Tegtmeyer is deceased and left no heirs, then the said trust fund with its accumulations is to be distributed in equal parts to the said parties to this contract unless in the meantime the said Frank Tegtmeyer appears and makes claim for his share of said estate;"

There was to be no distribution at any time unless it was proven that the said Frank Tegtmeyer is deceased and left no heirs. The evidence shows that Frank Tegtmeyer had been absent for a number of years, but there is little if any evidence and none competent, to show any real effort on the part of the complainants to find him or to ascertain whether or not he was dead and there is no evidence whatever in the record to show that he left no heirs.

The domicile of Frank Tegtmeyer must be his home in Iowa, from which he absented himself, otherwise there is no proof of his absence and in accordance with the authorities cited, his estate must be distributed to the heirs entitled to it under the laws of the state of his domicile. There being an expressed provision in the Code of Iowa as to the manner in which this could be done, this must be followed before the title to any of Frank Tegtmeyer's property or his interest in his father's or mother's estate passes to the heirs.

Until it is proven in the manner provided by the statute, that he is dead, who his heirs are, whether he died testate or intestate and whether he left creditors or not, or until

an opportunity is given, after the notice required by the statute, his brothers and sisters have no interest in his estate, which they can divide.

The agreement was not binding or enforcible. All of the parties to the agreement deliberately entered into an unlawful combination to deceive the court and to distribute among themselves the Estate of Frank Tegtmeyer or his interest in his father's estate. Such a contract is unenforcible in law or in equity.

The plaintiffs have no right to maintain this action, they have a plain, speedy and adequate remedy at law to have the absentee's estate administered in accordance with the statute.

Petitioner was not a party to the Agreement. She claims that she never signed the agreement, no person testified to seeing her sign it and her signature is in dispute even the experts do not agree as to whether or not the alleged signature is hers, but if she had signed the agreement which she emphatically denies, she was not a party to the agreement. She is not named as one of the contracting parties, it is added on the bottom of the contract, she says, without her knowledge:

> "It is further agreed, that Daisy Tegtmeyer, the wife of Edward Tegtmeyer is to sign this contract with her husband as a guarantee that the said trust fund of $5,000.00 with the interest accumulations will be kept and distributed as herein provided."

There is nothing in the agreement that she is to do, nothing that she is to receive, no benefit accruing to her in any manner and she could not be held to answer for any default on the part of her husband. However binding the contract might have been upon her husband, Edward

Tegtmeyer, she is in no manner responsible under the terms of the contract.

These are the questions to be determined upon a review of this case and we believe that the questions are important and serious enough to warrant this Court to grant the writs of certiorari respectfully prayed for.

CONCLUSION.

The petition for writ of certiorari should be granted.

Respectfully submitted,

DAISY TEGTMEYER,
Petitioner.

JOSEPH HELLER,
Attorney for Petitioner.